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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 308

UNITED STATES OF AMERICA EX REL. HERMANN HOEHN, PETITIONER

v.

EDWARD J. SHAUGHNESSY, AS DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION OF THE UNITED STATES FOR THE DISTRICT OF NEW YORK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 20-23) is reported at 175 F. 2d 116.

JURISDICTION

The judgment of the Court of Appeals was entered on June 7, 1949 (R. 24). The petition for a writ of certiorari was filed on September 2, 1949.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner, an alien enemy who has been ordered removed by the Attorney General under the Alien Enemy Act of 1798, has been denied the privilege of voluntary departure accorded him by that Act.

2. Whether a stipulation entered into by counsel for the parties to this litigation compels petitioner's release from custody.

3. Whether petitioner's service in the armed forces, from which he was honorably discharged on account of enemy alienage, entitles him to naturalization under Section 701 of the Nationality Act of 1940, and whether, if so, the failure of the Government to act on his application for naturalization constitutes ground for his release on habeas corpus.

STATUTE, PROCLAMATIONS, AND REGULATIONS INVOLVED

The provisions of the Alien Enemy Act of 1798, R. S. 4067-4070, as amended, 40 Stat. 531, 50 U.S.C. 21-24, are set out in Appendix A, *infra*, pp. 10-12. The text of Presidential Proclamation 2655 (59 Stat., Part 2, 870; 10 Fed. Reg. 8947) and the pertinent portion of Presidential Proclamation 2685 (60 Stat., Part 2, 1342; 11 Fed. Reg. 4079) are set forth in Appendix B, *infra*, pp. 12-15. The Attorney General's regulations issued pursuant to

Proclamation 2655 are set forth in Appendix C, *infra,* pp. 16-18.

STATEMENT

Petitioner was born in Trusenthuer, Germany, on May 31, 1904 (R. 10). He entered the United States on July 22, 1930 (R. 5). He was inducted into the United States Army on July 31, 1942, and was honorably discharged on November 12, 1942, because of his alienage (R. 5, 21). On January 5, 1943, he was arrested and interned as a potentially dangerous enemy alien (see Pet. 3). On January 12, 1946, the Attorney General, after a hearing before a Repatriation Hearing Board, issued an order declaring that he deemed petitioner to be dangerous to the public peace and safety of the United States and ordering him to depart from the United States within thirty days after notification of the order. The order directed the Commissioner of Immigration and Naturalization to provide for petitioner's removal to Germany if he failed to comply. (R. 10, 11-12.) On March 8, 1946, petitioner's sister applied to the Attorney General for a stay of removal. This was denied, but the Attorney General granted petitioner another thirty days within which to depart voluntarily. (R. 6.) Although he had been granted parole to enable him to leave, petitioner remained in the United States. He was thereafter taken into custody and held for removal. (R. 3-4.) [1]

[1] He was released on parole on January 8, 1949 (R. 21).

Petitioner then applied for a writ of habeas corpus (R. 3-8), which was allowed on June 11, 1946 (R. 2), and dismissed without opinion on October 4, 1946 (R.13-14). On November 12, 1946, petitioner appealed to the Court of Appeals (R. 15). On November 16, 1946, he stipulated with the United States Attorney that no removal action would be taken against him until the final determination in the case of *United States ex rel. Schlueter* v. *Watkins*. It was further stipulated that the parties would be bound by the final determination in that case and "that the action taken against said Herman Schlueter shall govern in all respects any action that may be taken against Hermann Hoehn." (R. 16-17.)

In the *Schlueter* case, as in the case at bar, the alien enemy, by a habeas corpus proceeding, challenged an order for his removal. The writ was dismissed and the dismissal was affirmed by the Court of Appeals for the Second Circuit. 158 F. 2d 853. That judicial determination is now final.

Petitioner, however, notwithstanding his stipulation, prosecuted his appeal, and the Court of Appeals affirmed the order dismissing the writ of habeas corpus (R. 20-23).

ARGUMENT

1. Petitioner's contention that he was not afforded a reasonable opportunity to depart voluntarily seems to be twofold: that the time allowed him was inadequate (Pet. 9-10), and that he was in effect prevented from departing voluntarily by the

circulation among foreign governments of a State Department "blacklist" allegedly containing his name (Pet. 10-11).

Actually, however, the reasonableness of the time allowed for petitioner's departure (R. 6, 11-12) is not and, in the circumstances of this case, cannot be questioned. Section 22 of the Alien Enemy Act [2] (Appendix A, *infra,* p. 11) left it to the President to declare what would constitute a reasonable time. The President declared 30 days to be reasonable (Proclamation No. 2685, Appendix B, *infra,* p. 15). See also the Regulations of the Attorney General under Proclamation 2655 (Appendix C, *infra,* p. 17), which provide that an alien enemy should have 30 days from receipt of notification of a removal order to depart from the United States. As against this, petitioner asserts nothing more than the inaccurate statement that there has been no determination of what constitutes a reasonable time (Pet. 10). Nor does he claim that, having tried to comply with the removal order, he found the time allotted too short.[3] He seeks to pose an issue by a mere suggestion, wholly unsupported, that 30 days is *per se* an inadequate and, therefore, unreasonable period of time within which to require an alien to depart.[4] We submit that the Court of Appeals was altogether correct in holding that the presumption of reasonableness

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[2] The section numbers used are those which appear in Title 50 of the United States Code.

[3] The fact is that he refused to comply.

[4] Actually, petitioner was allowed considerably more than 30 days (see p. 3, *supra*).

was not thereby rebutted (R. 23). See also *United States ex rel. Dorfler* v. *Watkins*, 171 F. 2d 431 (C. A. 2), certiorari denied, 337 U. S. 914.

Petitioner's further complaint (Pet. 10) against the State Department's circularization of the names of dangerous alien enemies to other nations is precisely the same as that made to this Court in the *Dorfler* case, No. 655, October Term, 1948, certiorari denied, 337 U. S. 914. In the brief for the respondent in opposition in that case, this charge was fully canvassed. We there said (pp. 9-10):

> The court below, which was fully aware that an alien must be afforded the statutory privilege of voluntary departure (*United States ex rel. Von Heymann* v. *Watkins*, 159 F. 2d 650 (C.A. 2)), rightly recognized that (R. 29) "The privilege of voluntary departure does not imply that the alien must be able to go to the country of his choice. So long as there is any foreign country to which he could have gone, his failure to go there is a 'neglect' or 'refusal' to depart voluntarily. Hence a communication by the State Department to a foreign country, which that country may or may not heed, cannot be regarded as an unlawful restraint on the alien's voluntary departure. The relators have had ample time to arrange to leave the United States and have made no showing that it was impossible for them to do so." Certainly, it would be an extremely short-sighted policy that enabled alien enemies "deemed dangerous to the public peace or safety of the United States" to gain admission to neighboring nations whose govern-

ments were unaware that such persons might disturb or threaten the individual or collective security and welfare of the American Republics. Common sense dictates that effective measures be taken to prevent subversive elements from regaining any vantage point within the Western Hemisphere. We submit that the privilege of voluntary departure afforded alien enemies by the Alien Enemy Act cannot be so construed as to make removal a meaningless step.

2. Petitioner is not entitled to release under his stipulation with the United States Attorney, as he claims (Pet. 11-14). It was clearly the intent of the parties that the instant case was to be controlled by the *judicial* determination in the *Schlueter* case so as to avoid the prosecution of separate appeals upon identical issues. The determinative condition of the stipulation was fulfilled when the judgment of the Court of Appeals, affirming the dismissal of the writ of habeas corpus in the *Schlueter* case, became final, notwithstanding that thereafter, by administrative decision, Schlueter was released. Consequently, petitioner should have abandoned his appeal below. He urges, however, that the United States Attorney undertook by this stipulation to bind the Government to accord him exactly the same administrative treatment as Schlueter ultimately received (Pet. 11-12). This the United States Attorney was without authority to do. See *Wilber National Bank* v. *United States*, 294 U. S. 120; *United States ex rel. Lapides* v. *Watkins*, 165 F. 2d 1017 (C.A. 2); *United States ex rel.*

Sage v. *District Director*, 82 F. 2d 630 (C.A. 7). The President conferred on the Attorney General, not the United States Attorney, the task of judgment as to the dangerousness of alien enemies. Thus, the stipulation was either, taking the view most favorable to petitioner, invalid and a nullity or, from the contrary view, a valid agreement which barred him from further contest of the removal order. In either case, of course, his present reliance upon it is wholly misplaced.

3. Petitioner contends here for the first time that by reason of his service in, and his honorable discharge from, the United States Army he is eligible for citizenship under Section 701 of the Nationality Act of 1940, as amended (56 Stat. 182; 58 Stat. 886; 59 Stat. 658; 8 U.S.C. 1001).[5] He filed a petition for naturalization under that section on December 31, 1946 (Pet. 3), but this was long after the order for his removal, and after he had filed his appeal from the order of the District Court dismissing the writ of habeas corpus (see pp. 3-4, *supra*). He argues that he is entitled to a decision on his petition before he is removed. (Pet. 6-9.)

Passing the question whether petitioner may complain of the Government's alleged failure to act on his naturalization application in this proceeding,[6] it is clear that petitioner is, in any event,

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[5] This section provides an accelerated naturalization process for honorably discharged veterans of World War II, without requiring a declaration of intention or any preliminary period of residence. Applicants under this section, however, must meet the other requirements of the naturalization laws.

[6] Petitioner has apparently failed to move, as he might have done, to calendar his petition for hearing (cf. Pet. 6-7).

not entitled to the benefits of Section 701 because he was discharged from the Army by reason of his alienage (R. 21). Section 704 of the Nationality Act (56 Stat. 182, 183; 8 U.S.C. 1004) expressly provides that the provisions of Section 701 "shall not apply to (1) any person who during World War II * * * is discharged therefrom [the military or naval forces] on account of his alienage, * * *." Petitioner was therefore not eligible to apply for citizenship without first fulfilling the normal requirements of the naturalization laws. He could not, simply by filing his petition for naturalization, frustrate the outstanding order for his removal. For the pendency of his application for naturalization puts him in no better position than other nonveteran alien enemies who might file a paper entitled "Petition for Naturalization".

CONCLUSION

Petitioner presents no substantial question warranting review here and the petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted.

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OCTOBER, 1949.

APPENDIX A

The Alien Enemy Act of 1798, R. S. 4067-4070, as amended, 50 U. S. C. 21-24, provides:[1]

§ 21. Restraint, regulation, and removal.

Whenever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted or threatened against the territory of the United States by any foreign nation or government, and the President makes public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies. The President is authorized in any such event, by his proclamation thereof, or other public act, to direct the conduct to be observed on the part of the United States, toward the aliens who become so liable; the manner and degree of the restraint to which they shall be subject and in what cases, and upon what security their residence shall be permitted, and to provide for the removal of those who, not being permitted to reside within the United States, refuse or neglect to depart therefrom; and to establish any other regulations which are found necessary in the premises and for the public safety. (R. S. § 4067; Apr. 16, 1918, ch. 55, 40 Stat. 531.)

[1] The section numbers used are those which appear in Title 50 of the United States Code.

§ 22. Time allowed to settle affairs and depart.

When an alien who becomes liable as an enemy, in the manner prescribed in section 21 of this title, is not chargeable with actual hostility, or other crime against the public safety, he shall be allowed, for the recovery, disposal, and removal of his goods and effects, and for his departure, the full time which is or shall be stipulated by any treaty then in force between the United States and the hostile nation or government of which he is a native, citizen, denizen, or subject; and where no such treaty exists, or is in force, the President may ascertain and declare such reasonable time as may be consistent with the public safety, and according to the dictates of humanity and national hospitality (R. S. § 4068).

§ 23. Jurisdiction of United States courts and judges.

After any such proclamation has been made, the several courts of the United States, having criminal jurisdiction, and the several justices and judges of the courts of the United States, are authorized and it shall be their duty, upon complaint against any alien enemy resident and at large within such jurisdiction or district, to the danger of the public peace or safety, and contrary to the tenor or intent of such proclamation, or other regulations which the President may have established, to cause such alien to be duly apprehended and conveyed before such court, judge, or justice; and after a full examination and hearing on such complaint, and sufficient cause appear-

ing, to order such alien to be removed out of the territory of the United States, or to give sureties for his good behavior, or to be otherwise restrained, conformably to the proclamation or regulations established as aforesaid, and to imprison, or otherwise secure such alien, until the order which may be so made shall be performed (R. S. § 4069).

§ 24. Duties of marshals.

When an alien enemy is required by the President, or by order of any court, judge, or justice, to depart and to be removed, it shall be the duty of the marshal of the district in which he shall be apprehended to provide therefor and to execute such order in person, or by his deputy or other discreet person to be employed by him, by causing a removal of such alien out of the territory of the United States; and for such removal the marshal shall have the warrant of the President, or of the court, judge, or justice ordering the same, as the case may be (R. S. § 4070).

APPENDIX B

Proclamation 2655, issued by President Truman on July 14, 1945, provides (59 Stat., Part 2, 870; 10 Fed. Reg. 8947):

A PROCLAMATION

Whereas section 4067 of the Revised Statutes of the United States (50 U. S. C. 21) provides:

"Whenever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory in-

cursion is perpetrated, attempted, or threatened against the territory of the United States by any foreign nation or government, and the President makes public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies. The President is authorized, in any such event, by his proclamation thereof, or other public act, to direct the conduct to be observed, on the part of the United States, toward the aliens who become so liable; the manner and degree of the restraint to which they shall be subject and in what cases, and upon what security their residence shall be permitted, and to provide for the removal of those who, not being permitted to reside within the United States, refuse or neglect to depart therefrom; and to establish any other regulations which are found necessary in the premises and for the public safety;"

Whereas sections 4068, 4069, and 4070 of the Revised Statutes of the United States (50 U. S. C. 22, 23, 24) make further provision relative to alien enemies;

Whereas the Congress by joint resolutions approved by the President on December 8 and 11, 1941, and June 5, 1942, declared the existence of a state of war between the United States and the Governments of Japan, Germany, Italy, Bulgaria, Hungary, and Rumania;

Whereas by Proclamation No. 2525 of December 7, 1941, Proclamations Nos. 2526 and 2527 of December 8, 1941, Proclamation No. 2533 of December 29, 1941, Proclamation No. 2537 of January 14, 1942, and Proclamation No. 2563 of July 17, 1942, the President prescribed and proclaimed certain regulations governing the conduct of alien enemies; and

Whereas I find it necessary in the interest of national defense and public safety to prescribe regulations additional and supplemental to such regulations:

Now, therefore, I, Harry S. Truman, President of the United States of America, acting under and by virtue of the authority vested in me by the Constitution of the United States and the aforesaid sections of the Revised Statutes of the United States, do hereby prescribe and proclaim the following regulations, additional and supplemental to those prescribed by the aforesaid proclamations:

All alien enemies now or hereafter interned within the continental limits of the United States pursuant to the aforesaid proclamations of the President of the United States who shall be deemed by the Attorney General to be dangerous to the public peace and safety of the United States because they have adhered to the aforesaid enemy governments or to the principles of government thereof shall be subject upon the order of the Attorney General to removal from the United States and may be required to depart therefrom in accordance with such regulations as he may prescribe.

In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington this 14th day of July in the year of our Lord nineteen hundred and forty-five and of the Independence of the United States of America the one hundred and seventieth.

By the President:

[SEAL.] HARRY S. TRUMAN.

JAMES F. BYRNES,
Secretary of State.

Presidential Proclamation 2685, issued April 10, 1946 (60 Stat., Part 2, 1342; 11 Fed. Reg. 4079), provides in part:

* * * * *

2. In all cases in which the Secretary of State shall have ordered the removal of an alien enemy under the authority of this proclamation or in which the Attorney General shall have ordered the removal of an alien enemy under the authority of Proclamation No. 2655 of July 14, 1945, thirty days shall be considered, and is hereby declared to be, a reasonable time for such alien enemy to effect the recovery, disposal, and removal of his goods and effects, and for his departure.

* * * * *

APPENDIX C

Regulations of the Attorney General (10 Fed. Reg. 12189) pursuant to Presidential Proclamation 2655:

TITLE 28—JUDICIAL ADMINISTRATION

CHAPTER I—DEPARTMENT OF JUSTICE

Part 30—Travel and Other Conduct of Aliens of Enemy Nationalities

REMOVAL OF ALIEN ENEMIES FROM THE U. S.

Sec.

30.71 Removal from the United States of alien enemies.
30.72 Order of the Attorney General.
30.73 Service of removal order on alien enemy.
30.74 Thirty-day period for voluntary departure.
30.75 Involuntary removal from the United States.

Authority: §§ 30.71 to 30.75, inclusive, issued under R. S. 4067; 50 U. S. C. 21.

§ 30.71 *Removal from the United States of alien enemies.*—The Proclamation of the President of the United States, No. 2655 (10 F. R. 8947), dated July 14, 1945, provides in part:

"All alien enemies * * * interned within * * * the United States * * * who shall be deemed by the Attorney General to be dangerous to the public peace and safety of the United States because they have adhered to the aforesaid enemy governments or to the

principles of government thereof shall be subject upon the order of the Attorney General to removal from the United States and may be required to depart therefrom in accordance with such regulations as the Attorney General may prescribe."

§ 30.72 *Order of the Attorney General.*—When a determination has been made by the Attorney General that an interned alien enemy is deemed to be dangerous to the public peace and safety of the United States because he has adhered to an enemy government or to the principles of government thereof, an order will be signed by the Attorney General directing that the said alien enemy depart from the United States within thirty (30) days after notification of the order and that, if he fails or neglects so to depart, the Commissioner of Immigration and Naturalization is to provide for the alien enemy's removal to the territory of the country of which he is a native, citizen, denizen or subject.

§ 30.73. *Service of removal order on alien enemy.*—A copy of the Attorney General's order of removal will be delivered to the alien enemy at the place where he is interned.

§ 30.74. *Thirty-day period for voluntary departure.*—An alien enemy who is the subject of a removal order shall have thirty (30) days after receiving notification of the removal order to depart from the United States. Unless the public safety otherwise requires, the Commissioner of Immigration and Naturalization is authorized to release such alien enemy from

internment under appropriate parole safeguards in order that the alien enemy may settle his personal and business affairs, provide for the recovery, disposal, and removal of his goods and effects, and make arrangements to depart from the United States.

§ 30.75 *Involuntary removal from the United States.*—In the event that an alien enemy, who is the subject of a removal order, fails or neglects to depart from the United States within the above-mentioned thirty-day period, the Commissioner of Immigration and Naturalization will take the alien enemy into custody and will provide for his removal to the territory of the country of which he is a native, citizen, denizen or subject, as soon as transportation is available.

Approved: September 26, 1945.

TOM C. CLARK,
Attorney General.

(F. R. Doc. 45—18005; Filed Sept. 27, 1945: 10:11 A. M.)

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